United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING EN BANC

77-1098

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B P/S

UNITED STATES OF AMERICA,

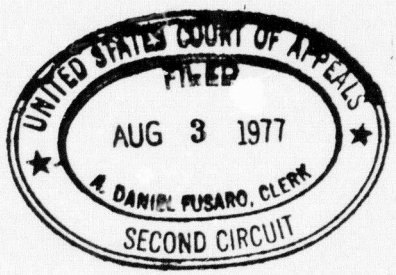
Plaintiff-Appellee,

-against-

VICTOR RAMIREZ,

Defendant-Appellant.

Docket No. 77-1098



PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- VICTOR RAMIREZ, Defendant-Appellant.	Docket No. 77-1098

PETITION FOR REHEARING
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ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Appellant Victor Ramirez seeks rehearing with a suggestion for rehearing en banc, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, from a judgment of a panel of this Court* (Meskill, C.J.; Neaher** and Coffrin,** D.JJ.)

*A copy of the order of this Court is annexed hereto as Appendix A.

**United States District Judges, sitting by designation.

entered on July 20, 1977, affirming a judgment rendered by the United States District Court for the Southern District of New York (Pierce, J.) convicting appellant of conspiracy to distribute and possess heroin with the intent to distribute, in violation of 21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A), 846.*

At trial, the Government's theory was that appellant participated in the conspiracy by selling $6,000 worth of heroin to a Government informant named Rene Rivera on August 15, 1975. The Government also offered proof of other transactions. As evidence of what occurred, the Government introduced tape recordings (GX 1-3**) of five conversations, occurring on August 15, 20, and 22, 1975, in which the informant Rivera had participated. Also introduced were transcripts of the contents of the tapes. The Government contended that four of these conversations were between the informant and co-defendant Herminio Gutierrez, and that the fifth conversation was between the informant and appellant and reflected the sale which was the subject of the substantive count of the indictment.

Since the conversations were recorded on a NAGRA recorder, which does not transmit, and since no non-participant overheard the conversations, authentication of the tapes was required by either the co-defendant or the informer. However, the informer

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*The indictment also charged appellant with the substantive crime, but the jury failed to reach a verdict on that count.

**Numerals in parentheses preceded by "GX" refer to the number identifying Government exhibits in evidence.

was unavailable and the co-defendant a fugitive.

During trial, defense counsel objected to the admission of the tapes and transcripts, challenging the accuracy of the tapes, the accuracy of the voice identification,* and the correctness of the transcripts of the tapes. Counsel argued that the tapes were inadmissible because the informant's unavailability precluded cross-examination about the tapes and the making of them. The District Judge overruled defense counsel's objections, and the tapes and transcripts were allowed into evidence.

On appeal, appellant Ramirez renewed his objections to the admissibility of the tapes and transcripts, arguing that it was error to admit this evidence because the necessary foundation had not been shown and that consequently there was no proof of the accuracy or reliability of the tapes.

On July 20, 1977, after hearing oral argument of this case, the panel affirmed appellant's conviction at that time in open court, without writing an opinion.

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*Despite the fact that DEA Agent William Mockler testified that he had heard appellant Ramirez speak in English for approximately an hour some eight months prior to the time he listened to the tapes (Trial transcript at 113, 129), and despite the fact that the tapes were in Spanish and the agent spoke little Spanish (Trial transcript at 120), Agent Mockler testified that he recognized the voices of appellant Ramirez and co-defendant Gutierrez on the tape of August 15, 1975 (Trial transcript at 118-119, 140).

Although the judgment in this case was affirmed without opinion, in contrast, on July 19, 1977, oral argument was heard and decision reserved in United States v. Fuentes, Doc. No. 77-1083 -- a case also raising the issue of the failure of the Government to establish the required foundation to show the accuracy and reliability of tape recordings to justify their admissibility. Thus, if the decision in Fuentes, whenever rendered, is favorable to the defendant-appellant, reconsideration of the decision in this case is necessary to assure that there will be no conflict between the two decisions and to maintain uniformity of this Court's precedents.

Further, the panel decision here is inconsistent with the prior law of this Circuit and, in light of the Government's extensive use of tape recordings, should be reconsidered and the panel decision vacated.

The requirement of establishing a "foundation" to justify the admission of a tape into evidence to corroborate a witness' testimony is clearly established. United States v. McKeever, 169 F.Supp. 426, 430 (S.D.N.Y. 1958), cited approvingly in United States v. McKeever, 271 F.2d 669, 675 (2d Cir. 1959); Monroe v. United States, 234 F.2d 49, 54 (D.C. Cir.), cert. denied, 352 U.S. 873 (1956); United States v. McMillan, 508 F.2d 101 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1975); McKeeman v. Commercial Credit Equipment Corp., 320 F.Supp. 938 (D.Neb. 1970). A fortiori, these requirements also apply when the tape is used not merely to corroborate testimony of wit-

nesses, but, as is permitted, when the tape is admitted as independent evidence. United States v. McMillan, supra; United States v. Bonanno, 487 F.2d 654, 659-660 (2d Cir. 1973). The burden of proving the proper foundation for the admissibility of the tapes is upon the Government, and it must establish the tapes' authenticity and reliability. United States v. Knohl, 379 F.2d 427, 440 (2d Cir.), cert. denied, 389 U.S. 973 (1967). Under McKeever, the Government must show, inter alia, that the operator of the equipment was capable of operating it, that the recording made is authentic and correct, that the recording has not been altered by additions or deletions, and that the recording itself is preserved. As the judge in McKeever stated:

> The reliability of the resulting recording must be established before the recording itself can be admitted. The "credibility" so to speak, of the recording itself, its accuracy and completeness, are left to the trial judge to determine as an initial or preliminary question of fact. The functional importance of foundation proof of accuracy and authenticity is highlighted by the obvious circumstances that the mechanical, physical recording cannot be cross-examined.
>
> United States v. McKeever, supra, 169 F.Supp. at 431, n.1.

These long-established requirements have been carried forward in the Federal Rules of Evidence. As one commentator has noted, under the applicable rule, Rule 901:

> Sound recordings are admissible in evidence provided a proper foundation has

been laid for their admission.

> Weinstein and Berger, Commentary on Rules of Evidence for the United States Courts ¶901 (b)(5)[02] at 901-69 (1975).

Recognizing that under this rule the correct standard for the necessary foundation was that articulated by Judge Herlands in the McKeever case, this commentator has stated:

> A proper foundation, Judge Herlands, wrote, consists of the following elements:
>
> (1) That the recording device was capable of taking the conversation now offered in evidence.
>
> (2) That the operator of the device was competent to operate the device.
>
> (3) That the recording is authentic and correct.
>
> (4) That changes, additions or deletions have not been made in the recording.
>
> (5) That the recording has been preserved in a manner that is shown to the court.
>
> (6) That the speakers are identified.
>
> (7) That the conversation elicited was made voluntarily and in good faith, without any kind of inducement.
>
> Weinstein and Berger, Commentaries, supra, at 901-70.

Absent compliance with the McKeever requirements, the tape recordings and transcripts in this case should not have been admitted:

> The court should refuse to admit a recording into evidence if speaker identification or any of the other elements of authentica-

tion are lacking.

Weinstein and Berger, ibid.; emphasis added.

Here, the requirements were not established, since no one could testify to the accuracy or reliability of the tapes and transcripts. The operator of the recorder -- the informer -- was unavailable, and the co-defendant who participated in four of the conversations had fled. While appellant was not present during these discussions, the tapes mention the name "Victor" in connection with a heroin transaction involving a large amount of money (GX 5, 8) as well as discussions about and confirmation of payments (GX 6, 8, 9), "quarters" (GX 8), and sales (GX 8). Thus, counsel was unable to cross-examine the informant as to whether the tape accurately reflected the conversations, as to whether the informant might possibly have manipulated the recording device, as to a complete explanation of the underlying events, and as to whether appellant Ramirez was the person referred to in the co-defendant's statements.

Similarly, there was no proof of the accuracy of the conversation the Government contended reflected the August 15 sale (GX 7). This tape was the only one in which it was asserted that appellant Ramirez was a party to the conversation. However, the transcript reflects that a third, unidentified person was present during the conversation.* As defense counsel

*Despite this tape, the jurors were unable to render a verdict on Count Two, the substantive count, which involved charges

argued, this circumstance raises the real possibility that the transcripts inaccurately reflect the events in question (Trial transcript at 420).

The tapes and transcripts were critical evidence in this case. The question of the proper foundation necessary for their admission into evidence was squarely presented by the facts of this case, as it is in United States v. Fuentes, supra. Because the panel decision in this case may conflict with that in Fuentes and is in conflict with the precedents, rehearing should be granted, and if necessary to maintain uniformity of this Court's decisions, rehearing en banc should be ordered.

(Footnote continued from the preceding page)

of the actual [illegible]e of narcotics. However, the tape and transcript were also available for their consideration of Count One, the conspiracy count.

CONCLUSION

For the foregoing reasons, rehearing or rehearing *en banc* should be granted.

Respectfully submitted,

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United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of July one thousand nine hundred and seventy-seven.

Present: HON. THOMAS J. MESKILL,
Circuit Judge

HON. EDWARD R. NEAHER,

HON. ALBERT W. COFFRIN,
District Judges

~~Circuit Judges~~

United States of America, Plaintiff-Appellee v. Herminio Gutierrez, a/k/a "Cuba", Victor Ramirez, Defendants Victor Ramirez, Defandant-Appellant.	77-1098

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

By: Arthur Heller
Deputy Clerk

CERTIFICATE OF SERVICE

August 3, 1977

I certify that a copy of this petition for rehearing has been mailed to the United States Attorney for the Southern District of New York.

Jonathan Lubell